IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

OSA No. **2 of 1999.**

Judgment reserved on**:** 9.3.2007

Date of Decision: April 5, 2007

UCO Bank … Appellant.

versus.

Sardara Singh & ors. …Respondents.

Coram:

The Hon'ble Mr.Justice Deepak Gupta, Judge.
The Hon'ble Mr. Justice Surinder Singh, Judge.

Whether approved for reporting?

For the Appellant: Mr. R.L.Sood, Sr.Advocate with Mr. Vikas Rajput, Advocate.

For the Respondents: 1 & 2. Mr. N.K.Sood, Advocate,

Per**- Deepak Gupta, J.**

This appeal is directed against the judgment of a learned Single Judge of this Court in Civil Suit No.196 of 1992 decided on 31.8.1998 whereby he has dismissed the suit of the appellant (hereinafter referred to as the plaintiff), on the ground that the suit was barred by limitation.

Brief facts necessary for disposal of the case are that defendant No.1 Sardara Singh was granted a loan of Rs. 1, 30,000/- by the plaintiff-bank on 24.8.1981, for purchase of a truck. Respondents – defendants No. 2 and 3, Harpal Singh and Shangara Singh stood guarantors for

repayment of loan. The loan agreement and guarantee deed were executed by the defendants on the same date. As per the loan agreement, the loan was to be paid in 30 equal monthly instalments. The first instalment was paid on 10.10.1981 and the last payment was payable on or before 10.4.1984. According to the plaintiff- bank, the defendants did not pay the loan amount despite repeated demands and legal notice and, therefore, the bank was compelled to file a suit for recovery of Rs. 5,20,388.55 paise. This suit was filed on 1.9.1992. The advance of the loan was not denied by the defendants. The rate of interest, was however, contested and it was also pleaded that the suit was not within limitation. Since the learned Single Judge dismissed the suit only on the ground of limitation, the only question which arises in the present appeal is whether the suit was filed within limitation.

As observed above, the last instalment as per terms of the agreement was payable on 4.10.1983. The plaintiff – bank to bring the suit within limitation relied upon, some payments alleged to have been deposited by the defendants on 24.8.1982, 2.9.1983 12.5.1986, 23.2.1987 and 18.6.1990. According to the plaintiff- bank on 28.8.1987, a balance confirmation was executed by one of the guarantors-defendants Harpal Singh. According to the plaintiff-bank it forebeared its right to sue the defendants since the defendants kept on promising to regularize their account. Reliance has also been placed on the letters dated 23.11.1989 and 30.1.1990 alleged to have been written by defendant No. 1 to the plaintiff – bank. According to the plaintiff- bank, the suit against the guarantors- defendants 2 and 3 is within limitation in view of clause-10 of the deed of guarantee.

On the other hand, the defendants denied the payments of amounts on the various dates mentioned above. They also denied having exempted the balance confirmation letters etc.

Section 19 of the Limitation Act, 1963 reads as follows:-

> "Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorized in this behalf, a fresh period of limitation shall be computed from the time when the payment was made.
>
> Provided that save in the case of payment of interest made before the 1st day of January, 1928, an acknowledgement of the payment appears in the handwriting of, or in a writing signed by, the person making the payment."

A bare reading of the above provision clearly shows that for this section to apply the payment must me made within the prescribed period of limitation by the debtor or his authorized agent and the said payment must be acknowledged by some form of writing in the hand of the person making the payment. The learned Single Judge after considering a number of authorities on this point including **Sant Lal Mahton v. Kamla Prasad and others,** AIR 1951 SC 477, **Syed Jalaluddin Hasan Quadri v. M/s Tarapharmacy represented by its Managing Partner Tarachand Agarwal,** AIR 1966 AP 136 and **The Kangra District Wholesale Cooperative Supplies and Marketing Society Limited v. M/s Buta Mal Sohan Lal** (1996) (2) Sim. LC 1), held that in order to claim the benefit of extension of period of limitation, under Section 19,

Limitation Act, 1963, the onus is heavily on the plaintiff to prove the acknowledgement of part payment having been made by defendant No.1.

From the evidence on record, it is apparent that none of the payments are made by the defendants to the plaintiff – bank or by a person duly authorized by them. We have also gone through the evidence. It would be pertinent to note that according to PW2 Rajpal Singh, a sum of Rs. 10,000/- was credited to the account of defendants on 24.8.1982. According to him, the amount was deposited by Kalyan Singh, authorized agent of defendant No.1. However, in cross-examination, he admits that he had no personal dealings with Sardara Singh and he did not personally know who was Kalyan Singh. He also admits that he cannot say if at the relevant time Kalyan Singh was the authorized agent of Sardara Singh. This witness has also attempted to prove credit voucher Ex.PD dated 2.9.1983 whereby a sum of Rs. 17983/- was deposited. According to this witness, the amount deposited by Sardara Singh and voucher Ex.PD is in the handwriting of Sardara Singh.

Even if this entry proved to be credited then also the suit is not within limitation and the plaintiff must show that a sum of Rs. 37,443/- was deposited by the defendants on 23.2.1987 and a sum of Rs. 2827.60 paise was deposited on 12.5.1986. As far as the entry in respect of an amount of Rs. 37,443/- is concerned, the plaintiff- bank has failed to show who deposited this amount. A perusal of the statement of account Ex.PW4/A shows that an amount of Rs. 37, 443/- was credited to the account by transfer on 23.2.1988. From where this amount came and who deposited the same has not been proved by the plaintiff. As far as the amount of Rs. 2827.60 paise is concerned, it is stated in the plaint

that this amount was deposited on 12.5.1986 but there is no corresponding entry with regard to payment of the said amount. There is one entry of Rs. 2827.60 paise made on 22.5.1986 but a perusal of Ex.PW4/A, clearly shows that this amount was credited to the account of the defendants on account of adjusting the amount of interest. If these two entries are ignored, it is evident that no payments were made by the defendants during the period 2.9.1983 till 18.6.1990 and therefore, it is evident that no payment has been made within the period of limitation.

Reliance placed by the plaintiff- bank on the balance confirmation letter (Ex.PW5/A) alleged to have been executed by defendant No.2 Harpal Singh is without any force since this balance confirmation letter has also been executed after the period of limitation which had already expired. It is settled law that the acknowledgement to pay a debt must be made within a period of limitation and since the letter Ex.PW5/A does not contain any promise to pay a time barred debt as envisaged in Section 25 of the Contract Act and, therefore, the same cannot be used by the plaintiff – bank for extending the period of limitation. As far as the letter dated 23.11.1989 Ex.PW6/A, is concerned, the plaintiff – bank has miserably failed to prove that the said letter was signed and delivered by defendant No.1. PW6 R. P. Gulati has stated that the letter dated 23.11.1989 was received by him through Dak and it was signed by Sardara Singh. However, he has not produced any receipt register since no receipt register of Dak was being maintained in the bank. In cross-examination, he stated that he does not know how Ex.PW6/A was received by him. He again stated that he has never seen Sardara Singh writing or signing. Interestingly, letter Ex.PW6/A does not contain any signature of any bank official to prove the fact that it was actually received in the bank. Even in this letter there is no

promise to pay a time barred debt envisaged under Section 25 of the Contract Act. Therefore, we are of the view that the learned Single Judge was right in holding that the suit was time barred.

In the alternative Shri R.L.Sood has raised a contention that even if the suit is time barred against the principal debtor Sardara Singh, it is still within limitation as far as guarantors are concerned and the limitation to file the suit against the guarantors would only start after the legal notice is issued. He has relied upon certain clauses of the memorandum of agreement Ex.PW7/A and the guarantee deed Ex.PW7/B. Reliance placed on clause 10 of the guarantee deed is without any basis. Clause 10 only makes the principal borrower an agent of the guarantor and provides that any acknowledgement made by the principal borrower would bind the guarantor. In the present case, there is no acknowledgment of loan by the principal borrower as held above within the period of limitation and as such this clause is not applicable.

Mr. Sood also submits that even if the suit is not within limitation against the principal borrower, it can be within limitation against the guarantors. There can be no dispute with regard to this proposition. However, there has to be some acknowledgement of loan by the guarantors in such eventuality. In case the suit is within limitation against the principal borrower then it will be within limitation against the guarantors. Even if the suit is not within the limitation against the principal borrower, if the guarantor has acknowledged to pay the debt within the period of limitation, it may still be within limitation against him. However, this does not mean that the plaintiff- bank can wait till eternity to file the suit against the guarantors. The suit against the guarantors must be filed within the period of limitation.

Mr. R.L.Sood has placed reliance on the following judgments: - **Dass Bank Ltd.** v. **Smt. Kali Kumari Debi and another,** AIR 1958 Calcutta 530, **Mrs. Margaret Lalita Samuel** v. **Indo Commercial Bank Ltd,** AIR 1979 SC 102,and **Union Bank of India Ernakulam** v. **T.J.Stephen and others,** AIR 1990 Kerala 180.

According to us, these judgments are not applicable to the facts and circumstances of the case. In **Margaret Lalita's** case (supra), the apex Court held that in a case of continuing guarantee and undertaking by the defendant to pay an amount so long the account is a live account, the limitation would start only after the account ceased to be a live account. The other two authorities are to similar effect.

In the present case, as discussed above, the last instalment was to be paid on 10.4.1984. Accepting that payment of Rs. 17,000/- was made on 2.9.1983, the suit should have been filed on 1.9.1986 or latest by 10.4.1987. The plaintiff bank did not file the suit within the aforesaid period to recover the amount from the defendant as well as guarantors. It could not have waited endlessly for filing the suit. The suit not having been filed within three years was not within limitation either against the principal borrower or the guarantors. In our considered view, the authorities cited by Shri R.L.Sood have no application since in the present case the account was no longer alive.

As far as the contention of the plaintiff of forbearance is concerned, there is no material or evidence on record to show that the defendants requested the plaintiff to delay the recovery nor there is any material to show that the plaintiff took any positive decision to delay filing of the suit on the asking of the defendants. The starting point of the limitation was the breach of contract, and assuming that the plaintiff-

bank could wait till the date of last instalment, the suit was to be filed on or before 10.4.1987 in any event.

In view of the above discussion, we find no merit in this appeal and the same is dismissed with costs.

(Deepak Gupta), J.

April 5, 2007. (Surinder Singh), J.

s.

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Judgment for consideration, please.

(Deepak Gupta), J.

I agree/do not agree.

(Surinder Singh), J.

List the appeal for pronouncement of judgment on April ____, 2007.

(Deepak Gupta),J.

Court Secy.